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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MEDIAPOWER, INC. et al.,

Cross-Complainants and Appellants,

v.

NATIONAL COUNCIL AGAINST
HEALTH FRAUD et al.,

Cross-Defendants and Respondents.

B156571

(Super. Ct. No. BC246920)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Law Offices of Carlos F. Negrete and Carlos F. Negrete for Cross-Complainants and Appellants, MediaPower, Inc. and Chris Homer.

Law Offices of Morse Mehrban and Morse Mehrban for Cross-Defendants and Respondents, Stephen J. Barrett, Quackwatch, Inc. and National Council Against Health Fraud, Inc.

MediaPower, Inc. and Chris Homer (collectively MediaPower) appeal from the trial court's order dismissing their cross-complaint under Code of Civil Procedure section 425.16¹ as a SLAPP (strategic lawsuits against public participation) suit. MediaPower contends the trial court erred in concluding the causes of action alleged in its cross-complaint arise from acts of the cross-defendants in furtherance of their right of petition or free speech under the United States or California Constitution in connection with a public issue. MediaPower also argues the trial court abused its discretion in denying MediaPower's motion for leave to conduct discovery while the anti-SLAPP motion was pending. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The National Council Against Health Fraud, Inc. (NCAHF) filed a lawsuit against MediaPower in March 2001 seeking injunctive relief and restitution under Business and Professions Code sections 17204 and 17535. The complaint alleged MediaPower distributes homeopathic products through false and misleading advertising claims regarding their health benefits.

MediaPower answered a first amended complaint and filed its own cross-complaint against NCAHF, Quackwatch, Inc. and Stephen J. Barrett, M.D., asserting causes of action for unlawful business practices in violation of Business and Professions Code section 17200, violation of civil rights, interference with prospective economic advantage and related torts. MediaPower alleged that NCAHF and the other cross-defendants "used the internet as their national pulpit by which they preach the exclusive validity of allopathic medicine to their cult-like followers. Their dogmatic medical mantras are laced with character assassinations and demagoguery to advance their own personal agenda and those of other executioners for traditional medicine." MediaPower further alleged NCAHF and the other cross-defendants are "engaged in a common plan

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

and scheme to prevent and obstruct the free flow of information on this topic [the value of alternative therapies] by means of intimidation, harassment, defamation, fraud, illegal acts and unfair business and trade practices,” including “false advertising,” “making false claims about MediaPower,” “filing frivolous lawsuits,” “internet spam campaigns,” “engaging in a campaign to discredit [MediaPower’s] products” and “disseminating false information.”

NCAHF filed a special motion to strike the cross-complaint pursuant to section 425.16. MediaPower filed an opposition to the motion to strike and, at the same time, a motion for leave to conduct discovery pursuant to section 425.16, subdivision (g).² In its opposition to the motion MediaPower asserted NCAHF had failed to meet its threshold burden to show the acts alleged in the cross-complaint were in furtherance of NCAHF’s constitutional right of petition or free speech in connection with a public issue and also argued there was no evidence the cross-complaint had been brought to chill NCAHF’s exercise of its constitutional rights. MediaPower also asserted that it had a reasonable probability of prevailing on its cross-complaint, although it alleged no additional facts beyond those contained in the cross-complaint and produced no evidence of any sort to substantiate its claims of wrongful conduct by NCAHF.

MediaPower’s motion for leave to conduct discovery asserted NCAHF’s anti-SLAPP motion was filed “in an effort to disrupt and delay discovery” and sought permission to take the deposition of NCAHF, which had been noticed prior to the filing of the anti-SLAPP motion, in order “to secure evidence, by way of testimony, as to the lack of factual support for the underlying [NCAHF] complaint and to obtain evidence in support of the Cross-Complaint.” MediaPower also stated, “it is believed that critical evidence that will establish the facts alleged in the Cross-Complaint will be obtained by

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Under section 425.16, subdivision (g), all discovery in the action is stayed once an anti-SLAPP motion is filed. The stay remains in effect until notice of entry of the order ruling on the motion. However, “[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.” (§ 425.16, subd. (g).)

the deposition and the other means of discovery,” but did not identify any specific areas for discovery or the information it believed would be obtained.

The trial court granted NCAHF’s motion to strike the cross-complaint and denied MediaPower’s motion for leave to conduct discovery on December 10, 2001. NCAHF filed a motion for attorney fees pursuant to section 425.16, subdivision (c) on December 18, 2001. On January 29, 2002 NCAHF dismissed its complaint without prejudice. Following briefing by both sides, on February 22, 2002 the court awarded NCAHF attorney fees and costs in the sum of \$3,328. MediaPower filed a timely notice of appeal.

DISCUSSION

1. Burdens of Proof and Standard of Review

“Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

The phrase “arising from” in section 425.16, subdivision (b)(1), means “the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of

the categories spelled out in section 425.16, subdivision (e)’ [Citations.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) There is no separate or additional requirement of proving the complaint was filed with intent to chill the defendant’s exercise of constitutional speech or petition rights. (*Equilon, supra*, 29 Cal.4th at pp. 58-67.)

We review the trial court’s ruling on an anti-SLAPP motion independently under a de novo standard of review. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) We review the trial court’s ruling on a request to conduct discovery prior to determination of the anti-SLAPP motion for an abuse of discretion. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 191; *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247.)

2. The Trial Court Properly Dismissed the Cross-Complaint under Section 425.16

a. MediaPower’s cross-complaint “arises from” protected activity

MediaPower’s cross-complaint alleges NCAHF engaged in a wide variety of unlawful conduct intended to discredit homeopathic and other nontraditional therapies.³ Although MediaPower asserts it “is not trying to silence” NCAHF, but simply to protect itself from allegedly tortious conduct, “such intentions are ultimately beside the point.” (*Equilon, supra*, 29 Cal.4th at p. 67.) MediaPower’s cross-complaint expressly was based on NCAHF’s activity in furtherance of its free speech and petition rights, including disseminating information regarding the safety and efficacy of alternative medicine over the internet and other media to potential consumers of homeopathic products and initiating litigation to further its purported goal of restricting access to nontraditional therapies.

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There is no dispute that discussion of the effectiveness of alternative medicines is “an issue of public interest” within the meaning of section 425.16, subdivisions (e)(3) and (e)(4). Indeed, MediaPower’s cross-complaint describes the “ongoing public debate concerning allopathic medicine versus all other therapies” as having produced “[t]housands of articles, web pages, documentaries, reports and television programs”

Nothing more is required for NCAHF to satisfy its initial burden under the anti-SLAPP statute of demonstrating MediaPower's cross-complaint was one arising from protected activity. (§ 425.16, subd. (b)(1).) "[A]ny 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' [Citation.] Plaintiffs' argument 'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.' [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94.)

b. *MediaPower failed to establish its claims' minimal merit*

In opposing the anti-SLAPP motion, MediaPower presented no evidence to substantiate its claims of wrongful conduct by NCAHF. On appeal MediaPower does not argue the trial court erred in concluding it had failed to defeat the anti-SLAPP motion by establishing a probability of prevailing on its claims. (See *Navellier v. Sletten, supra*, 29 Cal.4th at p. 95 ["no cause of action qualifies as a SLAPP merely because the defendant's actions conceptually fall within the ambit of the statute's initial prong. Despite the fact [defendant] has made a threshold showing that plaintiffs' action is one arising from statutorily protected activity, plaintiffs may defeat the anti-SLAPP motion by establishing a probability of prevailing on their claim. [Citation.]"].) Accordingly, having correctly concluded the cross-complaint arises from protected activity, the trial court properly dismissed the cross-complaint under section 425.16. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [issues not raised in an appellant's brief are deemed waived or abandoned]; see *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 ["Absent a sufficient showing of justification for the failure to raise an issue in a timely fashion, we need not consider any issue which, although raised at oral argument, was not adequately raised in the briefs"].)

3. *The Trial Court Did Not Err by Denying MediaPower's Request to Conduct Discovery*

MediaPower correctly asserts that upon a showing of good cause the trial court may, and under some circumstances must, permit the party opposing an anti-SLAPP motion to conduct “specified discovery” notwithstanding the general stay of discovery in effect pending determination of the motion. (§ 425.16, subd. (g).) “[T]he discovery stay and 30-day hearing requirement of section 425.16 literally applied in all cases might well adversely implicate a plaintiff’s due process rights If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated.” (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867-868; *Schroeder v. Irvine City Council*, *supra*, 97 Cal.App.4th at pp. 190-191.)

In denying MediaPower’s motion for discovery, the trial court found that MediaPower had failed to identify specific discovery and information they hoped to obtain by such discovery that “addresses whether the tortious conduct alleged in the cross-complaint actually occurred,” as required by section 425.16, subdivision (g). Our own review of the discovery motion confirms the trial court’s assessment. Moreover, in papers filed in opposition to NCAHF’s motion for attorney fees, MediaPower’s attorney declared under penalty of perjury that his discovery motion “was an ancillary proceeding that was not intertwined with the SLAPP Motion. The outcome of the Motion to Conduct Discovery did not have an effect on the outcome of the SLAPP Motion.” The trial court did not abuse its discretion in denying the motion. (*Schroeder v. Irvine City Council*, *supra*, 97 Cal.App.4th at pp. 190-191.)

DISPOSITION

The order dismissing the cross-complaint is affirmed. Respondents are to recover their costs on appeal.

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PERLUSS, P. J.

We concur:

WOODS, J.

MUNOZ (AURELIO), J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.